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Settlement of commercial disputes: Draft convention on transparency in treaty-based investor-State arbitration

Compilation of comments

Note by the Secretariat

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I. Introduction

1. At its sixtieth session, Working Group II (Arbitration and Conciliation) completed a second reading of the draft convention on transparency in treaty-based investor-State arbitration (the "draft convention"). At the close of that session, the Working Group requested the Secretariat to circulate the draft convention to Governments for their comments, with a view to consideration of the draft convention by the Commission at its forty-seventh session (A/CN.9/799, para. 13).

2. Further to that request, the Secretariat circulated the draft convention in the form set out in document A/CN.9/812. The present document reproduces comments received by the Secretariat on the draft convention. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Comments on the draft convention

A. Israel

[Original: English]
Date: 28 May 2014

Further to the Secretariat's Note LA/TL 133 (3)/ CU 2014/67, of April 2nd, 2014, Israel presents the following preliminary comments and suggestions in relation to the draft convention on transparency in treaty-based investor-State arbitration:

1. Paragraph 21 of the Annotations to the draft convention provides alternative wording to article 2(2). We suggest retaining the wording that currently appears in the draft convention rather than the alternative, as it better conveys the idea that the unilateral offer is subject to acceptance by the claimant. However, for the sake of clarity, the following minor modifications are proposed:

> "Where the UNCITRAL Rules on Transparency do not apply pursuant to paragraph 1, the UNCITRAL Rules on Transparency [,as they may be revised from time to time,] shall apply to an investor-State arbitration, whether or not initiated under the UNCITRAL Arbitration Rules, in which the respondent is a Party that has not made a reservation relevant to that investor-State arbitration under article 3(1), ~~and~~ provided that the claimant agrees explicitly and in writing, to the application of the UNCITRAL Rules on Transparency."

2. The suggested wording for Article 2(3) is useful, in that it clarifies precisely which version of the UNCITRAL Rules on Transparency will apply to a given dispute. We propose to retain Article 2(3) and, accordingly, to delete the words "as they may be revised from time to time," from Articles 2(1) and (2) (in accordance with the Secretariat's proposal in paragraph 22 of the Annotations).

3. The question of whether the convention should be treated as a successive treaty rather than as an amendment to an existing treaty (paragraph 16 of the Annotations to the draft convention) requires further clarification. In particular, we suggest clarifying the difference between application of the convention pursuant to

Article 2(1) (based on the mutual consent of States) and its application pursuant to Article 2(2) (unilateral offer).

In the case of Article 2(2), it appears inappropriate to construe a unilateral offer as a "successive treaty", since in that case, the other State that is a party to the relevant treaty has not given its consent to the application of the Rules on Transparency. Accordingly, it may be more accurate to view the offer as a unilateral undertaking that does not modify the existing treaty between the states parties. On the basis of this understanding, it would be up to each State to ensure, prior to ratification of, or accession to, the convention, that each unilateral offer which would take effect by virtue of Article 2(2) does not contravene applicable obligations under existing treaties. This does not entail a modification to the text of the convention, but we believe that such a clarification should be reflected in the travaux préparatoires.

4. The proposed modification to Article 4(6) clarifies the intent of the provision on withdrawal of reservation, as compared against the previous wording mentioned in paragraph 37 of the Annotations. We suggest a non-substantive edit, as follows:

> "If, after this Convention has entered into force for a Party, that Party withdraws a reservation ~~or modifies any existing reservation to this Convention with the effect of making such a withdrawal~~, such withdrawal ~~or modification~~ shall take effect upon receipt of the notification by the depositary. The foregoing shall also apply to a modification of an existing reservation to this Convention which in effect results in such a withdrawal".

B. Japan

[Original: English]
Date: 25 April 2014

The Government of Japan proposes the following provision as paragraph 3 bis after paragraph 3 under Article 4:

"3 bis. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned."

Paragraph 3 of Article 4 provides that a reservation made at the time of signature shall take effect simultaneously with the entry into force of the Convention in respect of the Party concerned whereas paragraph 4 provides that a reservation after the entry into force of the Convention for that Party shall take effect twelve months after the date of its receipt by the depositary. On the other hand, paragraph 2 of Article 9 provides, with respect to accession for example, that the Convention enters into force in respect of the acceding State six months after the date of deposit of its instrument of accession. Accordingly, with respect to accession the current text would create a situation where the Convention enters into force in respect of a Party which has acceded after the deposit of the third instrument but its reservation will not apply until twelve months after the deposit of its instrument of accession. In this connection, the proposed provision is intended to address such possibility by synchronizing the timings of effectuation of the Convention and the reservation in respect of an acceding Party.